FIL
OCT 11 889
JA ES H. McKEN

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1087.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY,

vs.

THE BOARD OF LEVEE COMMISSIONERS OF THE YAZOO MISSISSIPPI DELTA.

ARGUMENT OF JAMES FENTRESS, OF COUNSEL FOR PLAINTIFF.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

---

1. The State of Mississippi, in February, 1882, granted a charter to plaintiff in error, containing an exemption from taxation for a period therein prescribed. Under Acts subsequently passed, the State and counties, by their proper officers, in 1888, levy taxes and burdens on plaintiff's railroad, claiming that the same is now subject to taxation.

The plaintiff in error claims that the imposition of said taxes and burdens before the expiration of the period of exemption is the violation of the obligation of said charter contract, and by a bill in chancery obtained an injunction.

The chief question in this case may be accurately stated, as follows: *When*, under the terms of said charter, may the State levy taxes on said railroad?

The defendant in error says she may do so now, before the period of exemption has expired. The one says taxation first, exemption afterwards; the other says exemption precedes taxation, and that, by the terms of the charter, the time fixed *when* the State *may* tax is "when the period of exemption herein prescribed shall "have expired."

It is not necessary, so far as this case is concerned, for the court to modify, or the counsel to criticise, those extreme cases where courts, in the effort to avoid the supposed bad effects of ill-considered legislation, have adopted a different rule of construction for statutes and statutory contracts granting exemptions, etc., from that adopted in construing statutes and statutory contracts on other subjects.

It, however, seems plain to us that the same rules of construction should be applied in ascertaining the intention of the parties and what they agreed to in this case as are applied to contracts on other subjects; unless, indeed, we assume that the Judicial Department of the Government may, in this indirect, though it seems to us more dangerous way, assume the guardianship of the legislative department.

There is no practical difference in a court holding one statute or statutory contract to be valid, and another invalid, simply because the court deems the one politic and the other impolitic, and a court applying different rules of construction, by which one statute is made effective and another defeated, simply because the subject of one is the grant of land, and the subject of the other a grant of exemption from taxation.

The theory upon which our National and State Government is founded explicitly upsets such supervisory power, by declaring that the legal and legislative departments shall be separate and independent.

Article 3, Sections 1 and 2, of the Constitution of Mississippi. Article 1, Section 1, and Article 3, Constitution of the United States.

Of course, if the act of the legislature is in violation of some constitutional provision, it is the duty of courts so to declare, and that is the end of it. But, if the legislature had the right to legislate on the subject, the right to make the grant or contract by statute, the meaning of said grant or contract, the intention of the legislature making the grant or contract, the mind of the parties entering into the contract cannot safely—nor in accordance with our theory of government—be changed by the courts applying one rule of construction to one contract and another rule of construction as to another contract.

If a State, by acts of its legislature, makes two contracts, the terms of each being identical, though the subject of the one is exemption from taxation of a particular work, and the subject of the other a bonus, or amount of money contracted to be paid, and the rules created by the courts require in one case that the intention of the State as to the exemption contract shall be shown beyond *a reasonable doubt*, and as to the other the same rule as to all other contracts, to wit: the ascertainment of what the parties agreed to as determined by mere preponderance—we have reached a result not only unfair to the contracting parties, but in the teeth of the spirit and letter of our fundamental laws; which, so far from vesting in the legal department any power over the *policies* of the State, have vested such powers in a separate and independent branch of the government.

We conclude therefore that the extreme rule contended for by defendants in error is not sound law, and that the charter contract in this case should be interpreted and construed by the same rules as apply to contracts between individuals, or between states where the subject matter is not exemption from taxes.

It may be that the legislative department stands in need of such arbitrary and unwritten control, and it is conceded that it sometimes makes grievous mistakes in shaping and directing the policies of the State, but our contention is, that this control cannot under our system be exercised by the courts.

2. But let us try the extremest rule of construction, to wit: Must be "expressed in terms too plain to be mistaken," "a reasonable doubt * * * must be resolved in favor of the State." Now, under this rule, we ask the question: *When* may the property be taxed? *When* shall taxation begin? The answer is in the words of the charter, Section 8: "*And when the period of*

"*exemption herein prescribed shall have expired*, the property of "said railroad may be taxed," etc.

The real question in this case is, *when* may the property be taxed? The defendant in error says it may be taxed before the exemption has expired. They admit that the period of exemption therein prescribed has not expired; indeed, they claim it has not begun.

When may this property be taxed? The charter answers, "it "may be taxed *when* the period of exemption herein prescribed "shall have expired." Is not this an explicit answer? Is it not too plain to be mistaken?

The whole controversy between us lies here. They say this property may be taxed now, and they have assessed and attempted to collect such taxes. We say, no, it is not subject to tax until the period of exemption prescribed in the charter has expired, and it has not yet expired, and therefore we enjoin the collection of said taxes.

3. That this is the true solution of the issue in this case, is further shown by the fact that the State undertakes as a part of this charter contract to "make *certain* in advance of such investment "and as an inducement and consideration therefor, the *taxes and* "*burdens* which this State *will and will not* impose thereon."

There are to be no presumptions as to what taxes will be imposed—nothing left to inference or construction; but the State agrees to make *certain*, before investment, this tax matter. So now we look to the contract to see *when* the property may be taxed, and we find that the State has made it certain by contracting that, "*When* the period of exemption herein prescribed shall have *expired* the property of said railroad *may be taxed*."

Has the exemption expired? No one claims that it has. So we see no escape from the conclusion that any tax levied prior to the expiration of the term of exemption is in violation of the charter contract.

4. The counsel for defendants in error devote most of their time to a discussion of whether the period of exemption is twenty years or twenty-five years, or a movable date between these; but it seems to us immaterial in this controversy whether the one or the other is the period of exemption, as neither has expired, and the authority to tax begins after the expiration of the period of exemption.

If, therefore, it is agreed that neither period had expired when the taxes enjoined in this suit were levied, it is certain, if this contract is upheld, that the said levy of taxes is a violation of said contract.

5. So, with the argument and assumption of counsel for defendants in error, that the State's chief object was to secure an early completion to the Mississippi river, or that one of the chief objects sought by the State was the completion of a railroad to the Mississippi river (all of which has no foundation in fact, as will be hereafter shown). But suppose it was true, how can any such fact affect or change the *express* agreement that the State should make *plain* what taxes and burdens she would and would not impose, and the fact that she then declares that "*when* the period of exemption "herein prescribed *shall have expired*, the property of said railroad "*may be taxed*," etc., unless they can show that such exemption had expired?

In short, all the ingenious argument of said counsel can amount to no more than showing that the extreme period of exemption may—or would, in fact—be shortened, unless, indeed, they can upset the whole contract by inserting some such words as follows: "But the exemption from taxation shall not begin until after the "company has completed a railroad to the Mississippi river." And yet, with even such an explicit declaration, the whole sentence in said charter declaring "*when*" the property may be taxed, would have to be stricken out, or it would not be plain.

No play on words or assertion of the supposed *intentions* of the State can obscure the *fact* that she agreed to make the tax matter plain, and that she did fix the time when the property of plaintiff in error may be taxed, and that the time so fixed is after the "period of exemption herein prescribed shall have expired."

If, therefore, the period therein fixed has not expired, any ingenious shortening of said period, or discussion of the intention of the State as to terminus, etc., does not affect the issue in this case, which is, that these taxes were levied before the expiration of the period prescribed, and that consequently such levy is a violation of the obligation of this charter contract.

6. The charter in this case was approved on February 17, 1882, and was at once accepted, and work begun. Forty-five miles of railroad were completed under it, and opened for traffic in about two years. One hundred and forty miles of railroad were completed and in operation in a little over four years from the date of the charter. (Record, page 2.)

No taxes were claimed by the State or counties for the years 1882-3-4-5-6-7—six years. In 1884 there were forty-five miles of completed road; in 1886 there were one hundred and forty miles. Indeed, by the terms of the second section of the charter, the company was required to file in the office of the Secretary of State of Mississippi a statement from time to time, as the *lines were located*. The State and county authorities could not have been ignorant of this property being in existence and operation, and yet none of said authorities attempted to assess any part of it for taxation except the compress of the company at Yazoo City, it being expressly excepted from the exemption clause in Section 8, to wit: "not to include compresses and oil mills." This state of things can be explained on no other hypothesis than that the *practical construction* of the State and county authorities was, that the railroad was exempt from taxation.

Personal property of some kinds may be concealed and escape the tax assessor's eye; but here even the record of location was required to be filed, and here was 140 miles of railroad in operation day after day, and no claim on the part of the State nor of the counties that it should be assessed for taxation.

Indeed, this new theory was not heard of until after the opinion of this Court in the case of Vicksburg, Shreveport & Pacific Railroad Company vs. Dennis, delivered in 1886, had been published, and on a clear misconception, as we understand it, of said case, this denying our exemption was based. The whole claim is an afterthought. The parties to the contract understood its terms alike, acted on the construction for six years. (Record, page 5.) So far then as open actual construction of the contract by both parties for six years is concerned, the new theory has no countenance. If there had been any doubt as to what the State had agreed to in said charter, surely some of her officers would have discovered the doubt, and had the railroad assessed for taxation in 1882–3–4–5–6 or 7. This neglect to tax cannot be explained by supposing the property was hid or unknown, nor by supposing any sort of partiality for a railroad, which would blind the keen-eyed publicans of Mississippi. On the contrary, if there is any kind of property incapable of being hid, or of getting away, or of exciting the pity of a tax assessor, it is a railroad.

But it may be asked, "What is the value of practical construction by the parties of their contract?"

> *Optimus interpres rerum usus, contemporanea expositio est fortissima in lege.*
>
> "Tell me what has been done under a contract and I will tell you what it means."

It is the short and simple rule of fair dealing and common honesty which has defeated many shrewd afterthoughts, new phases of the meaning of words and sentences used, born in a light different from that in which the parties to the contract saw, understood, agreed, acted.

If it took one party to the contract six years to discover that the words used would bear a different meaning from that which the parties understood and acted on, he ought not to be allowed to assert the new view simply because it was not what was agreed on —not the contract they made. And this thought is strengthened by the fact that the party now asserting the new view is the party who drew the contract, and not only so, but the party who expressly undertook therein to make it "*certain*" as to this matter.

7. In order to the better comparison of the section of the charter construed in the case of Vicksburg, Shreveport & Pacific Railroad Company vs. Dennis, (the case on which they rely), and the section of the charter in the case at bar, we put them in parallel columns.

SEC. 2 of V., S. & P. R. R. Co. charter.	SEC. 8 of charter of Yazoo and Mississippi Valley Railroad Company.
"The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the limits of this State."—*116 U. S. Reports, page 665.*	"*Be it further enacted,* That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this State necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills,—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this Act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State treasury, to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns."

A mere glance at these parallel columns, without referring to the other differences between the charters, will show that the cases are radically different.

The particular clause of the charter in the case at bar upon which our opponents rely, even if we exclude what precedes and also what follows it, gives no support to their theory. That clause cut out from the context reads as follows, and we put in parallel column that clause filled out as in grammatical construction and plain meaning it must be read,

"Shall be exempt from taxation for a term of 20 years from the completion of said railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this Act."	"Shall be exempt from taxation" (from the date of the approval of this Act) "for a term of 20 years from the completion of said railroad to the Mississipi river, but not to extend beyond 25 years from the date of the approval of this Act."

It will be seen by comparing these two that the only difference between them in words is the placing the words "from the date of "the approval of this act" in both parts of the sentence. The evident sense and meaning is the same in both. The plain meaning of both is exemption from the date of the approval of the Act for a term of twenty years after completion to the river, but the exemption in no case must extend beyond twenty-five years from the approval of the Act; nor, if it is found practicable and a line is extended to the river in less than five years, shall the exemption be extended beyond twenty years from the completion of such extension, though the whole term of exemption does not reach twenty-five years.

As will be seen hereafter, this plain construction of the language used fits the condition of the parties at the time the contract was made, and gives to an enterprise so unusually difficult a possible five years more of exemption than the ordinary and usual twenty years exemption granted at that session to railroad companies, which proposed to build lines whose location and termini could be and were fixed in advance—lines over a territory that presented no extraordinary difficulty nor risk, nor doubt as to where it was practicable to locate them, no engineering difficulties, no periodical floods of a great river, no unreclaimed swamps. Lines, the location, cost and practicability of which could be determined in advance and without costly experiment.

8. Again, consider the words, "but not to extend beyond "twenty-five years from the date of the approval of this Act." If exemption began at the time of the approval of said Act, these words are full of meaning. If it did not, then they are not only surplusage, but confuse the meaning of the whole section.

In the one case, they prudently limit a possibility of perpetual exemption in case a line to the river should be found impracticable, for in Section 2 the words "if practicable" are used and the duty is made to depend on whether it is practicable. Put it out of the power of the company in any event, whether such line is found practicable or not, to claim the exemption more than five years beyond the common exemption of twenty years given to ordinary roads.

In the other case there would be a fixed term of exemption of twenty years, which could in no case be lengthened, and there is no intimation in any of the Acts of that legislature that any new railroad should have less than twenty years exemption.

Look at the clause a little closer. What is it that would begin at the approval of the Act and extend forwards? What is it whose extension "*from*" the approval of the Act more than twenty-five years was prohibited by this clause? Manifestly, the exemption.

9. The counsel for defendant says as to this clause, "The idea "was to induce early completion to the river, so as to *then* enjoy "exemption."

But would it not be an anomaly to find a railroad company who, instead of accepting 20 years present exemption, (to cover the period of construction when all was outgo and none was income),—considered it an inducement to have everything taxed while unremunerative, in order to have the same term of 20 years exemption at a future time when they did not so much need it? And can it be for a moment doubted that the legislature would have given this dangerous and doubtful enterprise the same 20 years exemption from the date of the Act that it gave so many other railroad companies at that session?

Take, for instance, the charter of the Canton, Aberdeen and Nashville Railroad, to which defendants refer, which was approved *same day* as the charter in the case at bar. (Acts of Mississippi, 1882, pages 1001-1008.) That was a road in the uplands running "via Starkville and West Point, via Aberdeen," etc, There is no preamble to that charter—no statement, as in this, that it is a "work of great public importance, and in strict accordance with "the true policy and interest of this State should be encouraged by "legislative sanction and *liberality*." No statement in that charter, as in this, that "the physical difficulties in constructing and maintaining" such a road "are such that no private company has so far "been able" to accomplish it; nevertheless a 20-year exemption was granted it "from the date of the approval of this Act." (Ibid, page 1008.) It will also be seen that thirteen of the incorporators in both these charters are the same persons. And yet the result of defendant's argument and construction is that the road more difficult and costly to build is to have a possible future exemption of 20 years, while the less difficult and costly road is to have a present exemption of 20 years. The road which the State declares should as a matter of "interest" and "true policy" be encouraged by her "*liberality*," is given a possible exemption of 20 years in the far future, and a road which is of no practical difficulty or special importance is given a full 20 years at once. And yet they speak of this matter as an inducement! The old saying, that "a bird in "the hand is worth two in the bush," is peculiarly illustrated in this case.

10. The utter unreasonableness of defendant's theory and argument is further shown by the fact, that according to their construction, the supposed future exemption cannot exceed 20 years, but may be lessened to a much shorter term. So that it would not only be the taking a future for a present grant—a future exemption, when they probably will little need it, for a present one which they certainly need—but they run the risk of not getting as long an exemption in the future as the legislature was granting every railroad company that asked it in the present. For defendant insists that every year over five years that it may take the plaintiff to ascertain the most practicable route to the river and to construct and complete it, takes one year off the 20-year exemption.

Nay, more. If a line or branch to the river is found by plaintiff to be impracticable from any cause, there will be no exemption at all—none in the present, none in the future.

A glance at the map of the State of Mississippi will show that the nearest point on the Chicago, St. Louis and New Orleans Railroad to the Mississippi river, "at or near a point opposite Arkansas "City," is about 100 miles on an air line. Now, if defendant's view of this charter contract is correct, it follows that the thirteen corporators who, under a charter of the Canton, Aberdeen and Nashville Railroad Company, approved same day as the charter in this case, get a present exemption for 20 years on that road in the uplands—these same men, according to defendant's construction, undertook the far more difficult, doubtful and dangerous work of developing a swamp country by railroads; and as to exemptions accept:

1. A future exemption, instead of one in the present.
2. An exemption when there would be an income from the

property, instead of one when the property was earning nothing.

3. A future exemption, which might be less than twenty years, instead of the usual and certain twenty years in the present, granted by the other contracting party to every railroad company asking it.

4. A future exemption which might, by no fault on their part, be defeated altogether, instead of twenty years now.

5. And making such an agreement when it was certain that it would take much time and money to ascertain whether the fulfilling of the condition on which exemption depended was practicable, and years of work and millions of money to complete it, if found practicable.

It might be said, however, that the State, for some cause or other, did not deem the plaintiff's proposed railroad of so much importance as any of the many others which, at that session of the legislature, she granted twenty years of exemption to. The truth is, on the contrary, that the State in this charter declares that plaintiff's proposed railroad "is a work of great public importance," and that it was as a matter of "policy and interest of this State" to be "encouraged."

Or, it might be said that the State, when considering the various railroad charters before that session of the legislature, for reasons which no one has the right to know, intended to be more illiberal with plaintiff's road than with the others. But the fact is, that the State, in plaintiff's charter, expressly declares that the same should, "in strict accordance with the true policy and interest of this State, be "encouraged by *legislative* sanction and *liberality*." The preamble to plaintiff's charter contains no idle, nor meaningless, nor untruthful words. The statement therein, that the "physical difficulties of "constructing and maintaining railroads," in that swamp country, "are such that no private company has so far been able to establish a "railroad therein," is verified by the fact that at almost every session of the legislature since the invention of railroads the most liberal charters have been granted to many score of railroad companies, giving them authority to build railroads in said delta, and the fact that at the time the charter in this case was granted, not one of them had built a single mile of railroad therein. Except a little narrow-gauge railroad, some fifteen miles long, running from Clarksdale on the river to some plantations near by, and which did not run in high water, the whole of the Yazoo delta, from Vicksburg to Memphis, was without a single mile of railroad in 1882. Now it has many miles of railroad in operation, and the pioneer who first risked its money in that territory, on the faith of the charter contract in this case, and who has spent millions of money in a comparatively unsettled country, and thus at a continual loss to itself for seven years, developed "the resources and wealth" of said State, is confronted, not with the "liberality" mentioned in the contract, but with the denial of its obligation, and the imposition of grievous burdens, which are sought to be defended by a technical construction of the language used, which is utterly at variance with what the parties to the contract understood and assented to, as well as with the first principles of fair dealing.

11. Again: What possible meaning can be given the clause immediately succeeding the exemption clause, if defendant's construction is adopted? If our construction of the exemption clause is adopted, to wit: that exemption began at the approval of the Act, the clause following it is natural and intelligible, viz.: "and *when* "the period of exemption herein prescribed shall have *expired*, the "property of said railroad may be taxed at the same rate as other "property in this State."

On our theory the State undertook to "make certain" what taxes and burdens would be imposed, and by this clause she fixes the time *when* taxes might be levied. But if, on their theory, the taxes, without any "making certain," begun at once, and would be merely suspended during the continuance of the exemption, of what use is this clause? Manifestly, when the exemption ended, taxes would accrue. Why, then, say "and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed?" Of course it was the subject of taxation when the exemption had expired. Why say it "*may*" be *then* taxed, if, indeed, it was subject to tax *before*?

If they say that these words were surplusage—mere declaration of what would be the result anyhow—it is a confession that these words are not considered with the others in determining the meaning of the whole, or if they are, they have no effect; while we give them a meaning, to wit: the fixing the time *when* taxation should begin, and that meaning is in harmony with the other parts of the Act, and especially answers to that part of this section in which the State undertook "to make certain in advance" what taxes would be imposed.

Once more: If the State thought it necessary to use this express language about taxes *after* the exemption had expired, why did she not also use similar language as to the taxes *before* exemption begun, if such were to be imposed?

She did expressly mention the one, why did she not also mention the other? especially as she undertook to make them "certain" in advance. *Expressio unius exclusio alterius.* This clause is therefore not merely surplusage, if defendant's construction is correct, but it is incongruous with the whole section thus interpreted.

12. A consideration of the last sentence in Section 8, strengthens the construction plaintiff puts upon said section, and is not conformable to the afterthought construction of defendant. Said sentence is as follows: "All of said taxes to which the property of said company "may be subject in this State, whether for county or State, shall be "collected by the Treasurer of this State and paid into the State "treasury, to be dealt with as the legislature may direct; but said "company shall be exempt from taxation by cities and towns."

This is an important and material part of this charter contract. Its value in money to the plaintiff is very great. It makes a mode of taxation entirely different from those which are governed by the ordinary revenue laws. It makes one collector of all taxes instead of many. One collector for both State and all the county taxes, instead of one for each in each county. It enables plaintiff, as to payment of taxes, to deal alone and directly with the Treasurer of the State, and thus avoid the expense of local agents to look after tax matters, and hunt up the many tax collectors, and keep up with their notices and times and places. It is wholesale instead of retail, so far as the railroad company is concerned, and may be paid each year by one check mailed by railroad company to treasurer, and thus avoid the danger of loss and time of agents in carrying the money to these many tax collectors and of keeping accounts with each.

There can be no misunderstanding of this part of the contract, to wit:

First. "*All* of said taxes to which the property of said company "*may be subject* in this State *shall*" be collected by the State Treasurer.

Second. And *all* such taxes shall be paid into the State treasury.

Third. *All* such taxes so collected and paid in shall "be dealt "with as the legislature may direct."

And yet we are seized upon by these county tax collectors as if our charter was of no effect. The ordinary county tax collector of each county demands the payment to him of the tax claimed for his county under the general revenue laws of the State, and in defiance of our charter mode. The Treasurer of the State, who alone is agreed upon as the collector, and the State Treasury, which alone is agreed upon as the depository of the collection in one lump, is entirely ignored.

It may be that the legislature, which alone has the power of disposition of all taxes collected from plaintiff, may, in the spirit of liberality, mentioned in the charter, return them to the company, or direct their expenditure towards the development of this swamp country, which the State has so much at heart. But these fellows in every county, who, but for the injunction in this case, would have forced us to pay to them, are under the revenue laws bound to pay their collections, not to the State treasury, but to the several county disbursers, for county purposes; while by our contract we are bound to pay all taxes legally assessable against us to the Treasurer of the State alone. In short, under this charter contract, if any taxes are due, they are not due to the counties, nor payable to or collectable by county tax collectors. So that, even if defendant is right in maintaining that we now owe any State or county taxes, we do not owe them to these defendants, and the injunction against them should be made perpetual. A payment to them for distribution to their several counties is no discharge of our charter obligation to pay all county and State taxes to the State Treasurer, and there is no statute changing our obligation, as fixed by our charter to pay to the State Treasurer, nor devolving the duty of collecting the same on these defendants in the stead of, or in behalf of the State Treasurer, nor requiring them to pay the same into the State treasury.

How do defendants propose to maintain these seizures for taxes by county collectors in the face of the scheme of taxation peculiar to this road, as fixed in its charter?

We call attention to the way Messrs. Calhoun and Green dispose of it in their printed brief in this case, page 9, and as this is the only brief for defendants we have seen, we suppose it correctly states the position of defendants. They say on page 9 of said brief, "To the argument that the charter provided a scheme of taxation "peculiar to that road it is sufficient to say that if this be true, the "scheme is to commence to be in force by express terms *after* the "termination of the exemption and not before it began, and the "right to tax before cannot be regarded as waived by silence as to "the mode of assessment and levy. It would fall into the general "plan before the exemption began." This position of defendants is like all the others they take, in utter disregard of the language of the section, and shows into what desperate straits this afterthought theory has driven them.

This very clause says, "*All* of said taxes to which the property "of said company *may be* subject in this state, whether for county "or state shall," etc. They claim that the property of the company is *subject* to the taxes enjoined in this case. If it is, are not these taxes covered by the word "*all?*"

This clause does not say anything about whether the taxes are before or after. It says "*all* * * to which the property of "the company *may be subject.*" So that if it is subject to the taxes claimed, they are covered by the scheme, and the defendants have no right under the Act of April 3, 1888, nor any other Act to collect them, unless such Acts overturn this provision of our charter. And if the property is not subject to these taxes the same result follows.

They say "the scheme is to commence to be in force by express "terms *after* the termination of the exemption," and yet the scheme comprehends *all* taxes to which the property may be subject.

We do not desire to press this admission of defendant's counsel, though it is made in a formal printed brief, but simply call attention to it, in order to show that this last clause is also inconsistent with their construction of Section 8, while it entirely accords with ours.

13. But they say, the great object which the State had was to have the railroad reach the Mississippi river. Let us briefly refer to the conditions surrounding the parties at the time this contract was made, and take a birds-eye view of the territory in which these works were to be placed.

At Memphis, Tennessee, the Chicasaw Bluffs extend out to the Mississippi river. At Vicksburg, Miss., the hills come to the east bank of said river also; but between these two points, the river bending to the westward and the hills to the eastward, there is the territory to be developed. It is about two hundred miles long, and about an average of fifty miles wide. The Deer creek, the Sunflower river and the Yazoo river lie in the order named east of the Mississippi river, and for the most part run parallel with it until they all are gathered into the Yazoo river, and it turns nearly west, emptying into the Mississippi river just above Vicksburg. The banks of these several streams are generally higher than any other part of this swamp country, and there is a depression between the Mississippi river bank and Deer creek, and between it and the Sunflower river, and between the Sunflower and other streams east of it. The general depression below the east bank of the Mississippi river is from twelve to twenty-two feet, the greatest depression being generally near the foot-hills. The general direction of the rivers named is from north to south, and besides those named there are the Yallabusha, the Tallahatchie, the Coldwater rivers, and numerous bayous, creeks, lagoons, lakes, and sloughs in parts of said delta. The lands are very fertile. the timber is extremely heavy, consisting chiefly of yellow gum, which will not float. The Mississippi and the Yazoo rivers are navigable all the year and some of the other streams and lakes at certain seasons of the year. The chief product of this territory is cotton, which is prepared for market in the late fall and winter, when dirt roads are generally bad. So much for this delta territory. The population of what is known now as the State of Mississippi in 1800 was 7,600, which was scattered along her navigable rivers—4,660 in Adams county, 294 in Jefferson county, 1,250 in Washington county—all along the Mississippi river. In 1810 the whole population was 31,306, and in 1820 the population was 75,448, located almost exclusively on lands contiguous to navigable rivers.

From the foothills east is an elevated country, gradually rising until it reaches the dividing ridge from which the waters flow on the one side directly to the Gulf of Mexico, and on the other to the Mississippi river. This dividing ridge lies in a north and south direction, with double as much territory on the west as on the east of it, and on the west there are many unnavigable streams with wide bottoms, difficult to cross at all seasons and almost impassable in the fall or winter. In 1882, the time when this charter contract was made, there was the Chicago, St. Louis and New Orleans Railroad on the west side of said dividing ridge, and the Mobile and Ohio Railroad on the east side thereof, running through the State from north to south, and the Vicksburg and Meridian Railroad and the Natchez, Jackson and Columbus, reaching the Mississippi river at Natchez and Vicksburg respectively, and the Mississippi and Tennessee Railroad, running from Grenada, Miss., to the Mississippi river at Memphis, Tenn. The railroad from Mobile to New Orleans across her southern boundary completes the list of her railroads then.

That part of the 4,000,000 acres of the alluvial lands between Vicksburg and the northern boundary of Mississippi lying near the Mississippi river or other navigable stream, had already *cheap transportation*—indeed, had long been settled and prosperous, as the statistics of said State show. This fact, and the further fact that water transportation has for obvious reasons always been cheaper than that by railroad, and the fact that cotton, the chief production of this delta, is not perishable, and that it varies in price less than any other staple product of the soil, make it clear that there was no reason why the State should be so anxious, as defendants assume she was, of getting a railroad to the Mississippi river in this swamp. And the further fact above mentioned, that the railroads already then in existence in her borders reach the Mississippi river—at New Orleans, at Natchez, Miss., at Vicksburg, Miss., and at Memphis, Tenn., the latter point only a few miles north, the first point a few miles south of and the other two within her borders—also shows that extending a railroad to the river in this swamp, was not an object of great importance to the State.

This exaggeration of a supposed great anxiety of said State to have such an extension, has, therefore, no foundation in the situation of the territory nor the welfare or prosperity of the State, the territory or the people in it.

There was, however, much the larger part of this fertile delta which was not accessible to natural water transportation, and consequently valueless; but which, if it could be reached by railroads, would, on account of its valuable timber and fertile soil, rapidly become productive and prosperous, "and thus develop the resources "and wealth of this State." These *un*developed lands lay, not on the Mississippi river, nor easily accessible to it, but "between the "Mississippi river and Deer creek, and between Deer creek and the "Sunflower river, and between the Sunflower and Yazoo rivers." (See Section 2.) It was these "basins and alluvial lands" which in the preamble are mentioned. It was the lands lying in "the Mis"sissippi river basin, and the Yazoo and Sunflower river basins" that are mentioned in the first clause of the preamble. It was the "penetrating" these and other undeveloped alluvial lands that the State declared "should be encouraged by legislative sanction and "liberality," as mentioned in the first section of the preamble. It was these "Mississippi, Sunflower, Deer creek and Yazoo bottoms "or basins," and "other alluvial lands," which no one had so far been able to develop, as mentioned in the second section of the preamble. It was the development of these undeveloped lands which were to increase "the resources and wealth" of said State, as mentioned in the third section of the preamble, and not the lands along the Mississippi river bank, which already had cheaper transportation than any artificial means of transportation could give.

14. But let us look a little closer at this charter and see, if in the means authorized to be used, or in their connections, we may not find the facts upon which defendants found their theory of construction, to wit: That the chief and controlling idea in the mind of the State, when she made this charter contract, was the early completion of a line to the Mississippi river.

First, then, what were the means to be used for developing this territory—were they canals or railroads? The answer is that it was to be a system of railroads.

Second. What about their connections? For, though it is apparent that the people along the bank of the Mississippi river had cheaper transportation already than a railroad could give them, and consequently, as a matter of reason as well as actual fact, such lands were already developed—indeed, were the first settled in the State—still, there may have been some occult reason in the mind of the State for thinking, as defendants claim, that the early completion of a railroad somewhere to the Mississippi river was a matter of the first importance, in order to develop the wealth and resources of the State.

It is also true that there were already two railroads running to the river within the boundaries of the State, directly from her capitol, and two others that ran through the State and reached the river, one just above and the other a few miles below her boundaries. Still, there must be some basis for the foundation upon which defendants build their whole theory, and as we have been unable to find it elsewhere, let us see if, in the connections of this system of railroads, or the objects of the authorized connections, as stated in the charter, we may not discover the secret of defendants' inspiration.

The preamble, in declaring the "great public importance" of the building of railroads in the aforementioned basins, adds as the object "and connecting them"—that is, these basins—"by railroads" — with what? with the Mississippi river? No. It reads, "and "connecting them by railroads and branches with *other railroads;*" and so, in the second section of the preamble, the words are "to "establish a railroad and branches developing said basins and alluvial lands, and connecting them," with what? the river? No; but "*with the railroad system of the country,*" and then it proceeds: "Now, therefore, in order to induce the investment of capital in the "construction, maintenance and operation of *such a railroad and* "*branches,*" etc., "Be it enacted," etc. Well, that seems plain. There is no intimation in the preamble of the immense importance of the completion of a railroad to the Mississippi river. On the contrary, the only connections mentioned are with the railroad system of the country—and yet this preamble purports to be a statement of the object sought, the means of attaining it, the difficulty of accomplishing it, and the importance of its accomplishment. It is, therefore, unaccountable why a State so full of the idea on which defendants base their whole construction, did not, in such a statement, mention it.

15. Again: The State in this charter deemed it so important to have in operation twenty miles of said railroads in three years, that she made a forfeiture of the whole charter depend on it. Well, surely, if her paramount desire was as defendants claim, she would certainly require this twenty miles to touch the river, or at least to be a part of a line reaching the river. How readest thou? Section 13, requiring the construction of twenty miles in three years on pain of forfeiture, makes no mention of the Mississippi river, nor any line towards it. How strange!! Now, here are two places where, if the State had such an idea as that upon which defendants base their theory, it certainly would have appeared; but we find not the slightest trace of it.

16. Let us try this idea of defendants again by the language

used in the charter. Was there any line of railroad to any particular place, required by the charter to be built? If so, we will surely find that such line starts from or reaches to the Mississippi river.

Well, we find in Section 2 of the charter, that there is a line which *must* be built—the building or not of which is not left, as all others are, to the discretion of the company, nor does it depend upon whether it is "practicable" or not. The time of its building is not fixed, but if they build any, this line to a particular place must be built. Is it to or from the Mississippi river? No. It says, "One of said lines of railroad or a branch therefrom, to be "extended to or pass through Yazoo City, Mississippi," and Yazoo City is not on the Mississippi river, but is on the foothills, on the furthest side of the swamp from the Mississippi river.

17. Again: If the State was impressed with the idea which defendants make so prominent, would she not, in authorizing a railroad and branches to develop such a territory, have at least required that the main line thereof should reach the river—the great objective point? Surely she would. But an examination of the Act fails to show that the State undertook to declare even which should be the main line, or where it should run; but, on the contrary, left the whole matter to the judgment and discretion of the company. The words used are, "One of said lines *or a branch* "therefrom * * * if practicable."

18. Ah! but they say, that in the second section of the Act these words occur: "One of said lines or a branch therefrom to reach "the Mississippi river at or near a point opposite Arkansas City, if "practicable, so as to connect such point on the east bank of the "Mississippi river with some point or points on the line of the "Chicago, St. Louis and New Orleans railroad;" and again, in the eighth section a reference is made to the completion to the Mississippi river. This is true. But in both cases the context shows, not only no certainty that such a line or branch would be built, but that

the parties understood that its practicability was doubtful, and so it was not made obligatory to build it. In Section 2 this is precisely expressed by the words "if practicable," and in Section 8 the clause "but not to extend beyond twenty-five years from the date "of the approval of this Act" contemplates such a line or branch as never being practicable or never being built, by fixing the extreme limit of the exemption at twenty-five years from the date of the Act.

It is impossible to believe that a State dominated, as they suppose, by the one idea of a line to said river, would have left such a leading and absorbing idea, with no other basis in this long charter than the two limited, halting clauses above mentioned. And the fact that it took six years to evolve this ingenious idea, and the Cæsarian operation of cutting it out from its hiding-place by the rude rending of the contexts which enclosed the supposed evidence of its existence, justifies the supposition that, if it is born at all, it is still-born.

Indeed, the birth of a new idea, after six years from the time of the intercourse of the parties to this contract, is too long a period of gestation or incubation to charge them as its parents.

This new thing is a bastard. It has no resemblance to any of the many salient features of this charter.

RECAPITULATION.

We have thus shown:

I. That the plain reading of the charter leaves no room for doubt as to the time "*when*" taxes may be levied. (See paragraphs 2, 3, 4 and 5 of this Argument.)

II. That both parties so practically construed it, and so acted under it for six years. (See paragraph 6.)

III. That the case on which they rely is utterly unlike this case, and that even the exemption clause in this case cut out from the context, does not support their theory. (See paragraph 7.)

IV. That their construction of the exemption clause is inconsistent with the clause itself, inconsistent with the clause immediately preceding it, inconsistent with the clauses succeeding it, inconsistent with the scheme of taxation therein declared, with the situation of the parties, and with the whole trend of the Act.

V. That the defendant's construction of the exemption clause is inconsistent with the clause immediately preceding it in Section 8, in this, that it leaves in uncertainty what the State expressly undertook to make "certain." Among other things is this, that the tax they claim is not only not mentioned in the Act, but there is not the slightest reference in the charter to it. Indeed, they claim it outside the charter, and yet the State undertook in the charter "to make *certain* * * the taxes and burdens which "this State will and will not impose thereon." They claim it under *subsequent* general laws, but the State undertook to make all taxes and burdens which she would impose thereon "certain *in* "*advance* of such investment and as an *inducement* and consider- "ation therefor."

VI. In this: That their construction is inconsistent with the latter part of the exemption clause itself, to wit: "But not to "extend beyond twenty-five years from the date of the approval "of this act." (See paragraphs 8, 9 and 10 of this Argument.)

VII. In this: That it is inconsistent with the clause immediately following the exemption clause and in the same sentence, to wit: "And when the period of exemption herein prescribed "shall have expired, the property of said railroad may be taxed "at the same rate as other property in this state." (See paragraphs 2, 3, 4 and 5 of this Argument.)

VIII. In this: That their construction is utterly inconsistent with the scheme of taxation declared by said Section 8 of the charter.

(*a*) The scheme of taxation made "certain" by said section of plaintiff's charter fixes the time *when* the property "may be taxed" as the time "*when* the exemption * * shall have ex-"pired," instead of before it has expired, as claimed by defendants.

(*b*) The scheme also makes "certain" that one State officer, instead of the numerous defendants, shall collect the taxes that may be imposed.

(*c*) It names the officer who alone is authorized to collect the taxes, viz.: The Treasurer of the State, and none of the officers whom defendants claim are authorized to collect such taxes, are, or even represent, the Treasurer of the State. They are all county officials.

(*d*) It fixes and makes certain the place where the taxes so collected shall be deposited, to wit, in the "State Treasury," instead of several county treasuries.

(*e*) It makes "certain" who shall deposit the taxes so collected in the State Treasury, and it is not any of defendants.

(*f*) It makes "certain" who shall have the *disposition* of all taxes "to which the property of said company may be subject," to wit, the "legislature" of the State, instead of counties and county officers.

(*g*) And, lastly, said tax scheme agreed on in said charter not only makes it plain that said taxes, so made "certain" as to the *time* when the property may be taxed, the *officer* by whom to be *collected*, the officer by whom it is to be *deposited*, when so collected, the *place* in which it is to be deposited, the party who alone may *deal* with said taxes when so collected and deposited, but also that such taxes, so collected, deposited and dealt with, comprehend not only State taxes but also county taxes as well—indeed "*all*" * * to which the property of said company *may be* subject—taxation by cities and towns being absolutely disallowed. (See paragraphs 11 and 12.)

IX. We also show that the supposed fact upon which defendant's theory is based has no existence, whether we consider the territory to be developed or the condition of the parties. (Paragraph 13.)

X. And that, looking to the whole charter and considering its different sections, this supposed fact, without which all defendant's superstructure falls of its own weight, is not to be found there; and hence that as it did not and does not exist, either in the language of the charter fairly construed nor outside of it, it has no existence at all as a fact. (See paragraphs 14, 15, 16, 17 and 18 of this Argument.)

XI. And then there is the result of defendant's theory, to wit: That, though it is perfectly manifest in reading the Act, that the great object was to develop an *un*developed swamp country by a system of railroads and branches, and that the proposed exemption was held out as an inducement to the vast work, yet that this whole swamp might be crossed by plaintiffs with railroads so that every part of it was accessible to markets and the railroad system of the country; still, if a line or branch of such a vast and costly network of roads did not reach the Mississippi river, even though the system of railroads with which it connected reached said river in a hundred places, still, if it was "impracticable" to reach it with a branch in this swamp there was to be no exemption whatever. In short, under their theory it is possible that a network of many hundred miles should cover this *un*developed country, and yet never have any exemption at all, under this charter. And it is a fact that 140 miles of such railroads have been built developing said undeveloped lands—and yet they claim there is no exemption. This result will shock the mind of one reading the whole charter, and should not be allowed.

I will not extend this argument by discussing the difference between a State exempting a particular property then *in existence*, while all of the same class then in existence are taxed, and a case where a State, in order to induce and secure the creation of a quasi public enterprise not then *in esse* grants a limited exemption until it is well established. Nor by referring to the fact that all railroads in said State were granted exemptions as inducement to their construction.

Nor will I discuss the question of jurisdiction lately raised in one of these cases, and the special tax theory in the other, especially as my associate counsel devote attention to these questions; but I deem it due to myself, as well as to the court, to say that I greatly preferred an oral argument in this case, and consented to its submission on printed briefs and argument simply from the fact that before we could reach the cases on an oral argument there would be innumerable yearly recurring levies and law suits. I am, however, as certain that these cases have been wrongly decided and should be reversed as a lawyer can be about the proper decision of any case. The submission of them is therefore in no sense because I think there is little or nothing in them.

JAMES FENTRESS,

General Solicitor and of Counsel for Plaintiff.

CHAPTER DXLI.

AN ACT incorporating the Yazoo and Mississippi Valley Railroad Company, and declaring its powers.

WHEREAS, The construction of railroads to, in, through and along the Mississippi river basin, and the Yazoo and Sunflower river basins, penetrating these and other alluvial lands in this State, west of the Chicago, St. Louis and New Orleans Railroad, and connecting them by railroads and branches with other railroads west, east, north and south, is deemed and hereby declared to be a work of great public importance and in strict accordance with the true policy and interest of this State, should be encouraged by legislative sanction and liberality; and,

WHEREAS, The physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country:

Now, therefore, in order to induce the investment of capital in the construction, maintenance and operation of such a railroad and branches, and thus develop the resources and wealth of this State:

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That R. C. Shepherd, F. Barksdale, J. Z. George, Wm. R. Pillow, F. A. Montgomery, G. W. Faison, John Willis, R. P. Neely, W. H. H. Green, John W. Shields, W. H. Osborn, J. C. Clarke, W. K. Ackerman, L. V. F. Randolph, A. R. Van Nest, F. Sturges, Jno. Elliott, W. W. Gebhard, James Fentress, W. H. Bayard, R. N. Miller, W. P. Harris, R. H. Thompson, James Trotter, L. E. Simonds, H. Q. Bridges and H. S. Foote, together with those

who may hereafter become stockholders, their successors and assigns, and the assigns of such assigns forever, be and they are hereby created a body corporate, under the name and style of the Yazoo and Mississippi Valley Railroad Company, and as such shall have perpetual succession; and said corporation, its successors and assigns, are hereby forever authorized and made capable in law to have, hold, purchase, receive and enjoy real and personal estate in this and other State or States, whether acquired by way of security or in satisfaction of debt, or by donation, purchase, devise or otherwise, and to hold, use and enjoy all of such real estate in fee simple or otherwise, and the same or any part thereof to sell, rent, lease, mortgage or otherwise dispose of or encumber; to sue and be sued, plead and be impleaded; to use a common seal, and the same to alter, break or renew at pleasure.

Sec. 2. *Be it further enacted,* That the said corporation shall also have, and it is hereby authorized and invested with the right and power to build and construct, and thereafter to use, operate, own and enjoy a railroad or railroads, with one or more tracks, into, along and across that part of the State of Mississippi lying between the Mississippi river and the Chicago, St. Louis and New Orleans Railroad, on such line or lines as shall be deemed best by the board of directors of the company hereby chartered; one of said lines or a branch therefrom to reach the Mississippi river at or near a point opposite Arkansas City if practicable, so as to connect such point on the east bank of the Mississippi river with some point or points on the line of the Chicago, St. Louis and New Orleans Railroad; one of said lines of railroad, or a branch therefrom, to be extended to or pass through Yazoo City, Mississippi; and said company shall have the right and power, and are hereby authorized to build one or more branches or lines of railroads between the Mississippi river and Deer creek, and between Deer creek and the Sunflower river, and between the Sunflower and Yazoo rivers, in the direction of or to the north line of this State, and extend the same, or any one thereof, in the direction of or to the south boundary line of this State, as shall from time to time, in the judgment of said company, be deemed proper; and shall also be authorized to construct and operate such spurs or laterals from or along such main line or branches not exceeding one hundred miles in length, as may from time to time be necessary or proper to fully develop said country lying west of the Chicago, St. Louis and New Orleans Railroad, and east of the Mississippi river, in this State; and the said company, as soon as and whenever, from time to time, they have located said line or lines of railroad or branches, spurs or laterals thereto, or any of them, shall file in the office of the Secretary of State a statement showing the general line thereof as far as the same has up to that time been located.

Sec. 3. *Be it further enacted*, That the capital stock of said company shall be five millions of dollars, but the same may be, from time to time, increased to a sum or sums not exceeding the amounts actually expended by said company in constructions, completions, equipments and additions to said railroads and property; and said company may issue any part of said stock as preferred stock, and fix the relative rights of common and preferred stock as to dividends and income, and they may issue said stock or any part thereof as fully paid and not liable to calls; and also such bonds and obligations as they may from time to time determine; said capital stock shall be in shares of one hundred dollars each, and each share thereof shall entitle the holder to one vote, under such regulations as the company may in its by-laws provide; said stock shall be deemed personal property, transferable by assignment agreeably to the by-laws of said company, and may be owned and voted by any person, association or corporation of this or any other State or country, in person or by proxy, with the same power as such stockholder (though an alien or foreigner), to bring and maintain suits, or do other acts, in his right as such stockholder, as if a resident and citizen of this State.

Sec. 4. *Be it further enacted*, That the affairs of said company shall be managed by a board of directors and such officers and agents under them as the interests of the company may, from time to time require; such board of directors shall consist of such a number of members as the company may determine, from time to time, but not less than five; one of whom shall be a resident of the State of Mississippi; and said board shall have power to appoint an executive committee with full power to act in their stead and place, at all times when said board of directors is not in session; the persons named in the first section of this act, may of their number organize a board of directors who may open books of subscription to the capital stock of said company, and when five hundred thousand dollars of stock has been subscribed, shall call a meeting of the stockholders or subscribers thereto, for the election of a board of directors; the term of office of director of said company shall be three years, and until his successor is elected and qualified, but in the first election of directors by the stockholders or subscribers to the capital stock as above provided, part of said directors shall be elected for one year, part for two years and part for three years, as may be determined at said meeting; and in each subsequent year a number of directors shall be elected by the stockholders equal to the number of directors whose term of office expires in such year; and said board of directors may, of their number, elect a president and fix his term of office and compensation; and may provide for the election of or appointment and removal of such other officers and agents as, and when they please, and may create and abolish such offices, fix the duration and compensation thereof, from time to time, as may seem best, and may adopt, modify or alter by-laws for said company at their will, not inconsistent with the laws of this State, and do all other acts proper or necessary to be done in the management of the affairs of said company.

SEC. 5. *Be it further enacted*, That said company may, from time to time, mortgage or convey in trust any or all of its property, real, personal and mixed, of any and every description whatsoever, then owned or thereafter to be acquired, and also all or any of its rights, powers, privileges, liabilities, immunities and franchises whether then owned, possessed and enjoyed or thereafter to be acquired, including its rights to be a corporation; and under such deed or deeds of trust or mortgage secure, execute and dispose of the mortgage bonds of said company, to such amounts and maturing at such times and bearing such interest as it may deem best; said company may also execute a mortgage or mortgages and trusts as aforesaid, to secure bonds or obligations of other railroad companies, or may endorse the bonds of any other railroad company or companies; or in any other manner guarantee such bonds and secure the same by a mortgage or mortgages on its own property and franchises, then owned or thereafter to be acquired, as fully as it could do if the bonds were issued by it as aforesaid; said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidating companies may agree upon; and it may lease its railroads and all its property and franchises, rights, powers, privileges and immunities then owned or thereafter to be acquired, or lease other railroads in or out of this State, for a term of years or in perpetuity, and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidating company; and in case of a lease, the lease shall, so far as the terms of the lease may allow, enjoy and possess all the property, rights, powers, privileges, liberties, immunities and franchises which the lessor had as to the leased premises; the said company is also authorized to do an express business over its own and other lines of railroad and steamboats or other conveyances in and out of this State; and to acquire or put up, use and operate a line or lines of telegraph in this and other State or States, and to acquire, hold and enjoy all such property as may be proper, necessary or convenient in doing the said express or telegraph business *provided*, that by such consolidation the maximum in section six applies only to roads hereafter built.

SEC. 6. *Be it further enacted*, That said company shall have and possess the power of fixing from time to time, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches; *provided*, said last mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates on freights: Sixty-five cents per hundred pounds for transporting first or second-class freights one hundred miles or less; forty-five cents per hundred pounds for transporting third or fourth-class freights one hundred miles or less: thirty-two cents per hundred pounds for transporting fifth or sixth-class freights one hundred miles or less: (reference being had herein to the classification of freights now recognized and observed on the existing railroad line between New Orleans and Jackson, Mississippi.) But in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of any passenger, or parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business, as above set out, may be charged and collected by said company; *provided, further*, that as to lumber, coal, iron, salt, machinery, fertilizers, bricks, lime, agricultural implements, steam engines and boilers, and other freights transported in car-loads, rates may be made by special agreements between the shippers and the company, for such sums as they may agree upon; but in all such cases the same rates shall be given to any shipper of an equal quantity, at the same time, under similar circumstances of similar freight between the same points. Nothing herein contained shall prevent the railroad company from making such reduction of rates below the maximum herein fixed as it may elect to do, for the purpose of fostering, aiding and developing the resources of the country, penetrated by its railroads and branches.

SEC. 7. *Be it further enacted*, That the right of way is hereby granted said company to pass in and through the State of Mississippi, with said railroads, branches, spurs and laterals aforesaid, and to enter upon and use all lands, rocks, timber, earth, sand, gravel, water or other materials, which may be found on the routes selected, and which may belong to the State of Mississippi, and be convenient or necessary for the use of said railroads; and wherever said railroads or the branches, spurs or laterals aforesaid are located, over any lands belonging to this State, the title in fee simple, to one hundred feet on each side of the center of said railroad track or tracks shall vest in said company, its successors and assigns; and said company is hereby authorized to cause such examinations and surveys to be made as shall be deemed necessary to determine the most eligible route or routes upon which to locate its line or lines, branches, spurs or laterals, and to enter upon and appropriate all such lands and materials as may be private property, which may be convenient or necessary for said road, together with one hundred feet on each side of the center of such road, laterals, branches or spurs; and in case the company fails to agree with the owners of such lands or materials upon the price to be paid for the fee simple title thereto, or in case the owner is under any disability in law to contract, or is absent from the county where such lands or materials are situate, or is unknown, the company may proceed to condemn such lands or materials as provided in section eight of the act, approved March 10, 1852, entitled "an act to incorporate the Mississippi Central Railroad Company," with all the rights and powers as therein provided; and upon such condemnation being had, the title in fee simple to such lands or materials, shall vest in the said company, its successors and assigns. Said company is also authorized to construct, maintain and operate its said railroads, branches, spurs and laterals under, over or across any and all streams and bodies of water in this State, whether navigable or not, which lie along or across the lines selected for said railroads, branches, laterals or spurs; and to erect, use and maintain ferries and bridges over the same; *provided*, that wherever a navigable stream or body of water is crossed by a bridge of said company, there shall be maintained a draw in such bridge sufficient to allow the passage of boats and water-crafts plying such waters, which draw shall be so operated as to cause no unreasonable delay to the passage of such water-craft; and the said company is also authorized and empowered, so far as this State can or may give such power and authority, to build, construct, maintain and operate of itself or with others, in or out of this State, a ferry across or a tunnel under, or a bridge over the Mississippi river at any point within this State, where its railroads, branches, laterals or spurs may reach said river, and to acquire and hold all such lands and materials as are or may be necessary or convenient for landings, wharves, inclines or approaches thereto; and it may establish such transfer landings, wharves, approaches and inclines as are or may be necessary or convenient in transferring by boat or other water-craft, all or any freights, passengers, cars or rolling stock, loaded or unloaded, upon and across said Mississippi river or any other river or body of water within this State, and may own, use, operate and control of itself or others, all such steamboats, ferries or other water-craft as are or may be convenient or necessary in crossing such water or plying therein, so as to develop trade over its said lines of railroad.

Sec. 8. *Be it further enacted*, That in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this State will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances, and all its property in this State, necessary or incident to the full exercise of all the powers herein granted—not to include compresses and oil mills—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond 25 years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State treasury, to be dealt with as the Legislature may direct; but said company shall be exempt from taxation by cities and towns.

Sec. 9. *Be it further enacted*,. That said company shall have power, and is hereby authorized to insure persons and property, or either, transported or to be transported over or on any part of its lines of railroad, and all other property coming, or about to come into the possession or control of said company for purposes of transportation, or incident thereto, or for storage in any of its depots, or storage houses, or wharves, and to charge and collect reasonable compensation for such insurance or storage, but no charge for storage shall be made on freights transported by them to their several railroad depots, until the consignee has had a reasonable time in which to remove the same. And it is authorized to erect or acquire, maintain and use such depots, storage houses, wharves, sheds, or other buildings or depositories in or out of this State, as shall be necessary or convenient in the exercise of the powers granted in this charter; and said company shall have power to construct and operate compressses and oil mills.

Sec. 10. *Be it further enacted*, That this company, be and it is hereby granted the right to run its railroads, branches, laterals or spurs into the corporate limits of any incorporated town or city, reached by the line or lines of said railroad, as they may hereafter be located, under the powers herein granted, and to build and operate such railroad tracks, across or along any streets of such incorporated municipality; *provided*, that such part of said railroad as shall be located in, across, under or upon any such street, shall be so constructed and operated as shall not unreasonably hinder its use as a street.

Sec. 11. *Be it further enacted*, That the board of directors, stockholders, executive committee and officers and agents of said company, may hold their meetings and transact the business of said company, in or out of this State, and may establish such offices as they may from time to time deem best, in or out of this

State. And any and all acts done by said company, its officers or agents, out of this State, shall be of the same force and effect as if done within this State.

SEC. 12. *Be it further enacted*, That no mortgage executed by said company shall protect its property against the collection of claims for damages done by its engines and cars to the persons or property of citizens and residents of the State of Mississippi.

SEC. 13. *Be it further enacted*, That unless said company shall construct and have in operation twenty miles of railroad within three years from the passage of this act, the Legislature shall have the right to declare this charter forfeited.

SEC. 14. *Be it further enacted*, That all acts in conflict with this act, or any part thereof, be and the same are hereby repealed, and that this act take effect and be in force from and after its passage, the public welfare requiring it.

Approved, February 17, 1882.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD
COMPANY, Plaintiffs in Error,

v.

THE BOARD OF LEVEE COMMISSIONERS FOR THE
YAZOO AND MISSISSIPPI DELTA,
Defendants in Error.

BRIEF OF S. S. CALHOON AND MARCELLUS GREEN, FOR DEFENDANTS IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, PLAINTIFFS IN ERROR.

v.

THE BOARD OF LEVEE COMMISSIONERS FOR THE YAZOO AND MISSISSIPPI DELTA,
DEFENDANTS IN ERROR.

BRIEF OF S. S. CALHOON AND MARCELLUS GREEN, FOR DEFENDANTS IN ERROR.

We rely on the soundness of the following propoistions, either one of which is sufficient for our purpose, viz:

1. The railroad company is not exempted from taxation by its charter until after its road shall reach the Mississippi river—a condition precedent unperformed.

2. Even if this is not the proper construction of the charter, the Legislature had no power under §§ 13 and 20, Art 12 of the Constitution of Mississippi, to exempt so as to bind the subsequent Legislature which *did tax* the property for levee purposes.

3. The Legislature could not bargain away its police power to tax for the construction of levees.

4. The Legislature under §§ 13 and 20 of Constitution of Mississippi cannot exempt any particular railroad from taxation, even if it had the power to exempt all of its class.

1. Complainant is not exempted from taxation on the

face of its charter until after its road shall reach the Mississippi river.

It is laid down as the first maxim of contruction that "it is not permitted to interpret what has no need of interpretation."

Potter's Dwarris, pp 125, 126 *and* 141;
U. S. v. Fisher, 2 *Cranch* 358;
Sedgwick on St and Const. Law, 51.

The preamble and the other sections of the act, do not conflict with the plain terms of the section, specifying that the exemption should be "for twenty years from the completion of said road to the Mississippi river," as we hope to show further on. On the contrary, we hope to show that they fully harmonize with it.

But suppose they do conflict with it by argumentative construction, it cannot affect it.

It is learning too familiar to require authority, that conflicting causes must yield, even in a deed, to the grant set forth in the granting clause. It is to the *grant* we must look, and everything inconsistent with that is nugatory, and can neither enlarge nor restrict its scope where it is plain in its terms. And so of statutes.

"The preamble cannot enlarge a statute. It may be referred to in doubtful cases; but where the terms of the enacting clause are clear and positive, the preamble cannot be resorted to. Though it may assist in construing ambiguous expressions, it cannot control clear ones."

Potter's Dwarris, pp 107, 108 *and notes;*
9 *Peters* 301: 3 *McCool* 298;
Sedg. St. and Const. Law, 51; 3 *Wharton* 610.

The true construction of the charter under consideration, under the above rules, is what its words in the grant plainly say, that the exemption should be "from the completion of the railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act." The idea was to induce early completion to the river so as to then enjoy the exemption.

It is hardly necessary to discuss the proposition that statutes should not be construed to work exemptions from taxation by implication; but it must be done plainly and beyond a reasonable doubt. The right to raise revenue by taxation is so vital to organized society, that an intent to abandon it, in any case, must appear in language too plain to be mistaken.

"A relinquishment of the right of taxation is not to be presumed unless expressed in terms too plain to be mistaken."

Jefferson v. Skelly, 1 *Blatch*, 436;
Gilman v. Sheboygen, 2 *Blatch*, 510;
Philadelphia v. Maryland, 10 *Howard*, 376.

"If, on any fair construction of the legislation, there is a reasonable doubt whether the contract (of exemption) is made out. this doubt must be resolved in favor of the State. There must be no room for controversy.

Bailey v. Maguire, 22 *Wallace* 215;
22 *Wallace*, 528; 21 *Wallace*, 498;
18 *Wallace* 206, 120 *U. S.* 569;
Cooley on Taxation, 204 *and note*, 205 *and note* 70.

In a charter the language of exemption was, that the property of the railroad "shall be exempted from taxation for ten years after the completion of the road." And it was held not exempt before completion.

V. S. & P. R R. v. Dennis, 116 *U. S.* 667;
Baton Rouge, etc., R. R., Co v Kirkland, 33 *La. Ann*. 622;
Vicksburg v. Dennis, 34 *La. Ann.* 954.

At the same session of the Legislature which passed complainant's charter, there was enacted the charter of the *Canton, Aberdeen, etc. R. R. Co.*, in which Section 8 is a copy of the eighth section of complainant's charter, *verbatim et literatim*, except that it uses the words "shall be exempted from taxation for a term of twenty years, from the date of approval of this act." Thus conclusively showing that the Legislature knew how to express itself, and showing what it means when it uses the word "*from*."

Acts 1882, *p.* 1009, *Sec.* 8.

We refer also to other charters at the same session.

Acts of 1882, *p.* 861, *Sec.* 18;

Acts of 1882, *p.* 895, *Sec.* 25;
Acts of 1882, *p.* 942, *Sec.* 13;
Acts of 1882, *p.* 988, *Sec.* 26;

All of which four charters give exemption from "the passage of the acts."

Now, at the same session was passed still another charter, that to incorporate the *Memphis & New Orleans Railroad and Levee Company*, in which, with similar preparatory language as in the eighth section of complainant's charter, there will be found the following quite significant language: "Shall be exempt from taxation during the construction of, etc." *Acts*, 1882, *p.* 883, *Sec.* 8. So, it seems that when the Legislature designed to exempt before completion, it knew how to say so.

Recurring to the general principles before referred to, we need simply raise a doubt that the legislative intent was to exempt only from the date of reaching the Mississippi river. Complainants must exclude all doubt of this. They must show that there is "no room for controversy."

Now, in the light of these principles, let us examine the charter.

From its whole scope it is plain that the main object was to reach the Mississippi river. *Section 2* shows this in stipulating, after providing power to build branches and spurs nearly everywhere in the Delta, that "one of said lines or branches to reach the Mississippi river, etc.;" and *Section 8* shows it by limiting the exemption "from the completion of said railroad to the Mississippi river."

It was thought of great importance to reach that river, and as soon as possible, so as to have a railroad interested in keeping up levees, as well as in developing the country. We had been expending immense sums on those levees, and had been memorializing Congress for help.

The scheme was, in the present charter, to expedite this end by granting complainants very large powers, and exempting all the millions of property it might own in its main lines, spurs and branches, for twenty years from the time it touched the river with any of them, and the hope was, to induce it to reach the river within five years at most by providing that, while it exempted for twenty years *after* reaching the river, still, the whole period should not extend beyond twenty-five years *from the approval of the Act.*

If such was not the intent, why refer to the Mississippi river at all? Why not simply exempt for twenty-five years from the approval of the act, as in *Section 13*, complainants should construct twenty miles within three years from the passage of the act? No answer, consistent with reason, can be made to these questions.

If complainants had selected some twenty miles, and had built that, to avoid forfeiture by *Section 13*, and found it the best paying railroad in the world, could it ever be contended that this was exempt for twenty-five years from the approval of the act?

Suppose, with no design ever to reach the river, complainants had built hundreds of miles of railroads, could it be contended that all this should be exempt for twenty-five years from the approval of the act?

It seems to us these questions are conclusive as to the true construction of the act.

This charter gives enormous and very unusual powers.

Section 1 empowers the ownership of any quantity of land or personalty to sell, lease, or rent.

Section 2 empowers to build any number of railroads, in any part of the Delta, in any direction.

Section 6 empowers the company to fix its own rate of charges, not to exceed a very liberal maximum indicated.

Section 7 empowers to enter on State lands anywhere, and take free, in fee simple, one hundred feet on each side of the centre of any of its tracks as right-of-way, and to use, free, any rock, timber, earth, sand, gravel, water, or other materials, anywhere found on State lands along their routes, and to build bridges across any stream, whether navigable or not, with right of wharves, steamboats, etc.

Section 9 empowers to insure persons, or property, transported, and to construct compresses and oil mills.

Section 8 exempts the whole property necessary to the full exercise of the powers granted, except compresses and oil mills, "from taxation for a term of twenty years *from the completion of said railroad to the Mississippi river*, but not to extend beyond twenty-five years from the date of the approval of this act."

So, it seems, fairly considered, that all these large privileges were really designed to insure the early completion of the road to the river, and with this key we readily unlock the meaning of the whole statute.

Upon no other construction can we harmonize all the parts of *Section 8.* Just after the word "act," in the last quotation, *Section 8* proceeds:

"And, when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this State. All of said taxes to which the property of said Company may be subject in this State, whether for county or State, shall be collected by the Treasurer of this State and paid into the State Treasury, to be dealt with as the Legislature may direct; but said Company shall be *exempt from taxation by cities and towns.*"

Upon the construction insisted on by complainants, it is not to be escaped that it was designed to exempt from tax by cities and towns forever. The courts will be slow to construe this into a perpetual exemption from tax by municipalities.

Our construction avoids this by referring the municipal exemption to the *time intervening before completion to the river*, and for the twenty years thereafter. If the other was the meaning it surely would have been explicitly stated to be in perpetuity. If it meant that the cities and towns, and the State, could not commence to tax until twenty years *after* completion to the river, it was superfluous, if the first clause gave such exemption as against the State, for the reason that this would have *included* cities and towns without express mention, as was decided in *Southern R. R. Co. v. Mayor etc., of Jackson*, 38 *Miss.* 334 Complainant's argument leads to the conclusion that, if they never reached the river, still they were exempt for twenty-five years.

The claim that appellees discard all of *Section 8*, except the words of the granting clause, is a mistake. On the contrary, they urge the view that the key to unlock the meaning of the whole Act is to be found:

A. In the express terms of the grant of exemption for, viz: "twenty years from the completion of said railroad to the Mississippi river" in *Section 8* of the charter.

B. In the manifest object of the Legislature to reach that river, as shown in *Section 2* of the charter in these words, "one of said lines, or a branch thereof, to reach the Mississippi river at, or near, a point opposite Arkansas City, if practicable, so as to connect such point on the east bank," etc., etc.

C. That this language in the two sections shows the purpose to have the road reach the Mississippi river, and, therefore to commence the exemption from that time, in order to expedite touching that river, by a powerful incentive.

It will not do to refer the words "if practicable," in *Section 2*, to the "Mississippi river." Clearly they refer to the point at which the river is to be touched, if practicable, but the river must be somewhere reached, as is plain from both sections, the point opposite Arkansas City being preferable to the Legislature. If the opposite view is unsound, based as it is on argumentation as against plain language, the whole argument for the railroad company falls to the ground

To the argument that the charter provided a scheme of taxation peculiar to that road, it is sufficient to say that, if this be true the scheme is to commence to be in force, by express terms, after the termination of the exemption, and not before it began, and the right to tax before cannot be regarded as waived by silence as to the mode of assessment and levy. It would fall into the general plan before the exemption began.

The construction of this charter was settled by the highest court of the State of Mississippi *before* the decision of this case by the Circuit Court, and such construction of a State statute by the State Court is binding as authority on this Court. *Yazoo Miss. Valley R. R. Co. v. Thomas No.* 1086 *on the Docket. Burgess v. Seligman* 107 *U. S.* 33–4. 16 *Wal.* 590.

2. The Legislature has no power to exempt so as to bind the subsequent Legislature which did tax the property for levee purposes.

The Constitution of the State of Mississippi, *Article 12, Section 20*, is as follows:

Sec. 20 "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Section 13 of the same article provides that,

"*Sec. 13.* The property of all corporations, for pecuniary profit, shall be subject to taxation the same as that of individuals."

This Constitution was ratified and took effect *December 1st, 1869* about *thirteen years before* the complainants obtained the charter under which they proceed in this cause.

These sections of *Article 12* of the Constitution were duly construed by the Supreme Court of the State of Mississippi at its *April term, A. D., 1878.* about *four years before* complainants obtained their said charter, in the case of

Mississippi Mills v. Cook, 56 *Miss.*, 40.

In which it is held that any charter exempting such corporations from taxes, does not protect against subsequent taxation by succeeding Legislatures; that it is always subject to taxation; and, being ever liable to be taxed under the Constitution, no Legislature may contract away the power of subsequent Legislatures to tax.

" The interpretation by State courts becomes part of the " law construed, as much so as if it was incorporated in " the body of it by the Legislature."

Potter's Dwarris, p 143;

Christy v Pridgeon, 4 *Wallace* 196

The same is true as to State Constitutions,

Webster v. Cooper, 14 *How.* 488;

7 *How.* 1, 812; 1 *Wall.* 175; 7 *Wall.* 523;

92 *U. S.* 289; 94 *U. S.* 260; 100 *U. S.* 47;
105 *U. S.* 60, 66–7; 109 *U. S.* 244.

This should be conclusive of the question at issue here.

Complainants took their charter with the Constitution before them, and with the construction of it by the State Supreme Court before them. After the case of *Miss. Mills v. Cook*, 56 *Miss.*, 40, it does not lie in their mouth to interpose any objection on the score of the inviolability of contracts, and vex this forum with appeals based on the Constitution of the United States. If it is an invalid contract—one *ultra vires*—the United States Constitution cannot be invoked, since it refers to valid contracts, not void ones, and our own State Supreme Court, in construing our own State Constitution, has declared such exemption void.

3. The Legislature cannot bargain away its police power to tax for the construction of levees.

It is familiar learning that a Legislature cannot contract away its police powers. The maintenance of levees by local taxation is a police power to protect vast interests from destruction, and a Legislature cannot contract it away any more than the power to abate nuisances, or to forbid lotteries, or to protect against fire or pestilence.

Moore v. State, 48 *Miss.* 147;
Same case. 101 *U. S.* 814;
Cooley on Taxation, *pp* 590-1;
Cooley on Const. Lim. Star pp 283 *and notes*;
And 281 *et seq. and* 509 *et seq.*

In Mr. Cooley's book on taxation, assessment for levees are treated of as police powers along with those for sidewalks, sewers, drainage, duties to prevent fires, license fees, etc.

See also
Hamer v. Alcorn, 38 *Miss.* 759;
Dailey v. Swope, 47 *Miss.* 377,

holding that the general requirement of equality and uniformity does not apply to taxation for local purposes, and that the general tax laws do not apply to these.

In the case last cited read particularly from the bottom of *page* 382 on, to show that general exemptions do not embrace local purposes.

For instance: "No church property shall be taxed." Held, a church might be taxed to improve a street. 11 *Johns*, 77; 4 *Comst.* 433.

A railroad charter was one and one-half per cent. on its capital stock "and no other or further impositions shall be levied or imposed on the company." Yet the exemption was denied in a case of local improvement. 3 *Deutch*, 187.

Baltimore v. Proprietors, 7 *Md.*, 517.

A charter provided that the company "should not be liable to any tax, or imposition, whatever," but the court said this referred to ordinary revenues, and not to such as were incident to location.

Canal v. Chicago, 12 *Ill.*, 405:

See also *Vassar v. George*, 47 *Miss.*, 713, that local taxes for local purposes are not included in *Article* 12, *Section* 20, of Constitution of Mississippi, in reference to equality and uniformity.

Levees are necessary, and their costs may be taxed on the parties benefitted by them.

Hogan v. Reclamation District, 111 *U. S.*, 705.

Bradley, J., says:

"Whatever differences of opinion may exist as to the "extent of the police power, there seems to be no doubt "that it does extend to the protection of the lives, health "and property of the citizens."

Beer Company v. Massachusetts, 97 *U. S.*, 25-28;
Butcher v Crescent, 111 *U. S.*, 752.

We refer the court also to

Cooley on Taxation, 590, *Note 2 and* 620.
Cooley on Const. Lim., 733;
Macon v. Patty, 57 *Miss.*, 385.

Where the Legislature designs to exempt from levee taxes—even if it had the power to do so, it does it in express terms, as in its exemption of levee bonds—*Acts* 1888, *p.* 106—using the words "from all taxes and assessments, whether State, county, municipal, levee or local."

But for the levees, no property, whether real or personal, would be of any value in the district affected by the overflows, and we respectfully urge that there is no good reason for any difference being made between land and personal property in reference to the police power of taxation or assessment.

4. The Legislature cannot exempt any particular railroad from taxation, even if it had the power to exempt all of its class.

In support of this proposition we cite, *Mississippi Mills v Cook*, 56 *Miss.*, 40, and the brief of counsel for appellee, and the authorities it cites.

Section 20, *Article* 12, *Constitution of Mississippi*, requires that " taxation shall be equal and uniform throughout the State." Under this we say, to use an illustration suggested by the decision, that, while the Legislature, in order to encourage the raising of stock in the State, might exempt all brood mares, it could not exempt the brood mares of John Smith. It might exempt all railroads, but not a single one, and, in exempting all it could not contract so as to control succeeding Legislatures.

Respectfully submitted,
MARCELLUS GREEN,
S. S. CALHOON,
For Defendants in Error.